



[Billing Code 6355-01-P]

## **CONSUMER PRODUCT SAFETY COMMISSION**

### **16 CFR Part 1450**

**[Docket No. CPSC-2019-0012]**

### **Virginia Graeme Baker Pool and Spa Safety Act Drain Cover Standard**

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Final rule; delay of effective date.

**SUMMARY:** On May 24, 2019, the Consumer Product Safety Commission (Commission, or CPSC) issued a direct final rule incorporating sections of APSP-16 2017 as the successor drain cover standard under the Virginia Graeme Baker Pool and Spa Safety Act (VGBA, or Act). We are publishing this final rule to delay the effective date of the CPSC's mandatory standard for drain covers, due to the COVID-19 pandemic.

**DATES:** The effective date for the direct final rule published on May 24, 2019, at 84 FR 24021, is delayed from November 24, 2020, until May 24, 2021.

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### **SUPPLEMENTARY INFORMATION:**

#### **A. Background**

The VGBA, 15 U.S.C. 8001 et seq., took effect on December 19, 2008. The VGBA's purpose is to prevent drain entrapment and child drowning in swimming pools and spas. In part, the Act requires that drain covers must comply with entrapment protection requirements specified by the joint standard from the American Society of

Material Engineers (ASME) and the American National Standards Institute (ANSI), ASME/ANSI A112.19.8 performance standard, or any successor standard. The VGBA also states that public pools must be equipped with drain covers that meet the requirements of the ASME/ANSI standard or any successor standard. Under the VGBA, if ASME or another organization proposes a successor standard, the Commission will incorporate the revised standard if the Commission determines that it is in the public interest.

On February 17, 2011, the Association of Pool and Spa Professionals (APSP) approved the ANSI/APSP/IAPMO-16 2011 standard, *Suction Fittings for Use in Swimming Pools, Wading Pools, Spas, and Hot Tubs*, to succeed ASME/ANSI A112.19.8-2007. ASME then withdrew ASME/ANSI A112.19.8 2007. On August 5, 2011, the Commission incorporated APSP-16 2011 into 16 CFR part 1450 as the successor drain cover standard, with an effective date of September 6, 2011. 76 FR 47436 (Aug. 5, 2011).

On August 18, 2017, APSP published APSP-16 2017. On May 24, 2019, the Commission published a direct final rule in the *Federal Register*, incorporating portions of APSP-16 2017 into its mandatory drain cover standard, 16 CFR part 1450, with an effective date of November 24, 2020 (84 FR 24021).

On March 24, 2020, the Pool & Hot Tub Alliance (PHTA)<sup>1</sup> requested a minimum 6-month extension of the effective date for APSP-16 2017, due to the COVID-19 health crisis, which, PHTA indicated, had led to closures of third party testing laboratories. On

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<sup>1</sup> PHTA was created in January, 2019, from a unification of the National Swimming Pool Foundation® (NSPF) and the Association of Pool and Spa Professionals (APSP).

May 28, 2020, PHTA updated its request to a 60-day extension, noting that although laboratories remained open, COVID-19 disruptions to testing and SOFA manufacturing remain.

## **B. APSP-16 2017**

APSP-16 2017 establishes materials, testing, use, installation, and marking requirements for new or replacement bather-accessible suction outlet fitting assemblies (SOFAs), other than maintenance drains, which are designed to be fully submerged in any pool. CPSC incorporated changes from the 2011 to the 2017 version of the standard into its mandatory drain cover standard, 16 CFR part 1450. The changes include: a change in the hair test approach time; changes that require assessment and hair testing at all suction outlet pipes; the addition of an “unblockable drain” definition; and labeling requirements.

### **1. Hair Entrapment Testing**

APSP-16 2017 reduced the test time for hair to approach the suction outlet cover in the hair entrapment testing. The cumulative reduction in test time decreases the test burden in two separate iterative hair test procedures, without affecting test results. In another change, APSP-16 2017 expands the scope of the hair tests to include locations at all outlet pipes within SOFAs that can be reached by the test hair. This change ensures that any outlet in a SOFA, within reach of the 16-inch test hair, will be tested. Multiple outlet SOFAs are typically installed in larger pools. For affected SOFAs, the change will tend to lower water flow ratings because the lowest flow among all the outlets tested becomes the flow rating.

### **2. New “Unblockable SOFA” Definition in APSP-16 2017.**

The definition section of APSP-16 2017 includes a definition of “Unblockable SOFA”:

A suction outlet fitting assembly that, when installed according to the manufacturer’s instructions, cannot be shadowed by an 18 in. x 23 in. (457 mm x 584 mm) Body Blocking Element, and has a rated flow through the remaining open area beyond the shadowed portion that cannot create a suction force in excess of the force calculated in Equation 2.

The Commission incorporated this definition into its mandatory drain cover standard.

### 3. New Labelling Requirements in APSP–16 2017.

Section 8.4 of APSP-16 2017 contains requirements for the labelling of a SOFA, requiring identifying information, such as the manufacturer name and cover/grate part number, and date of the installation of the cover/grate. Section 8.5.1 contains labeling requirements for Registered Design Professional (RDP) SOFAs. Section 9.3 adds provisions regarding a General Certificate of Conformity (GCC) that are consistent with the Consumer Product Safety Act and VGBA. These requirements identify the product, the manufacturer, and the test lab that performed the analysis, as well as state the standard to which the product was tested, and when and where it was tested. Because the presence of this information makes it easy to identify relevant safety information about the product, the Commission found these requirements to be in the public interest, and thus, incorporated them into its mandatory drain cover standard.

### **C. Impacts of Delaying the Effective Date of the Rule**

PHTA requested that the Commission extend the effective date of the mandatory drain cover standard. This may delay the implementation of the changes that were made

to APSP-16 2017 and incorporated into the mandatory drain cover standard. The multiple outlet testing has some direct benefit to public safety due to modestly lowered water flow ratings for those multiple outlet SOFA types. The other changes – hair entrapment test times, the new definitions and labelling - are in the public interest and may indirectly benefit public safety. However, the Commission does not believe extending the effective date would have a significant negative impact on safety. The Commission believes that up to a 6-month extension of the effective date is not expected to adversely affect public safety because:

(1) Multiple outlet SOFAs are typically installed in large public pools, predominately located outdoors and open in the warmest months, and are less likely to be installed in public spas open during other seasons. Outdoor pools are likely to continue to transition towards full capacity for summer 2020, at a pace dependent upon developments with the COVID-19 crisis. Less exposure overall to outdoor pools will lessen the public's exposure to affected SOFA installations, which are those in new construction or replacements. Accordingly, the Commission does not expect a delay in the availability of SOFAs complying with APSP-16 2017 to adversely impact public safety;

(2) According to the 2019 CPSC entrapment report,<sup>2</sup> there have been six injuries (and no deaths) due to hair entrapment in the years 2014 to 2018. The report includes incidents with all types of SOFAs in both public and residential pools. CPSC staff estimates that each year, all new SOFAs installed as replacements,<sup>3</sup> or in new

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<sup>2</sup> 2014–2018 Reported Circulation/Suction Entrapment Incidents Associated with Pools, Spas, and Whirlpool Bathtubs, 2019 Report.

<sup>3</sup> The typical service life for all SOFAs is 7 years, representing a 14 percent turnover of SOFAs each year.

installations,<sup>4</sup> together represent no more than 15 percent of all SOFAs in public pools. Multiple outlet SOFAs that are affected by the new multiple outlet testing requirements represent a fraction of this total; although CPSC staff does not have an estimate of the size of the affected multiple outlet market. Because few injuries and no deaths are reported over 5 years of data, a delay due to an extension is not expected to adversely impact any benefit that improved multiple outlet testing may have on public safety;

(3) An extension of the effective date prior to Memorial Day 2021 will require firms to comply before the seasonal opening of most outdoor public pools in the United States.

#### **D. The APA and Good Cause Finding**

The Commission is issuing this final rule without an additional opportunity for public comment. Under section 553(b)(3)(B) of the Administrative Procedure Act (APA), general notice and the opportunity for public comment are not required for a rulemaking when an “agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>5</sup>

The COVID-19 pandemic has disrupted economic activity in the United States. Executive Order 13294 urges federal agencies to take actions to reduce regulatory burdens that arise as a result of the pandemic “consistent with applicable law and with

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<sup>4</sup> In 2014-2015, there were 243,499 existing and 2,432 new commercial pools (1% new). Source: APSP, P.K. Data, Inc.: *U.S. Swimming Pool and Hot Tub Market 2015*.

<sup>5</sup> 5 U.S.C. 553(b)(3)(B).

protection of the public health and safety.” Due to the COVID-19 pandemic, manufacturers may face difficulties in their ability to comply with the new requirements of the mandatory drain cover standard by the November 24, 2020, effective date set in the DFR. Therefore, the Commission is delaying the effective date of the drain cover standard until May 24, 2021. Delaying the effective date will not have an adverse impact on public health and safety; and as encouraged by EO 13924, the delayed effective date will help provide relief from disruptions exacerbated by the pandemic. Because of the relatively short time frame until the original November 24, 2020 effective date is scheduled to go into effect, and for the reasons discussed above, the Commission finds that there is good cause consistent with the public interest to issue the rule without advance notice and comment.<sup>6</sup> As a result of this rule, the DFR published by the Commission on May 24, 2019, which incorporated sections of APSP-16 2017 into the Commission’s mandatory drain cover standard, will not be reflected in the Code of Federal Regulations until May 24, 2021.

The APA generally requires a 30-day delayed effective date for final rules, except for: (1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.<sup>7</sup> The Commission believes that the public interest is best served by having this final rule become effective immediately upon publication in the *Federal Register*, instead of the usual 30-day delayed effective date normally required by the

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<sup>6</sup> 5 U.S.C. 553(b)(3)(B); 553(d)(3).

<sup>7</sup> 5 U.S.C. 553(d).

APA. Therefore, the Commission finds that there is good cause to delay the effective date of the previously approved change to 16 CFR part 1450 of the Commission's standard, for the reasons noted above.

#### **E. Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA) generally requires that agencies review proposed and final rules for their potential economic impact on small entities, including small businesses, and prepare regulatory flexibility analyses. 5 U.S.C. 603 and 604. The RFA applies to any rule that is subject to notice and comment procedures under section 553 of the APA. *Id.* As discussed, consistent with section 553(b)(B) of the APA, the Commission has determined for good cause that general notice and opportunity for public comment is unnecessary. Thus, the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply. However, the Commission has assessed how the COVID-19 pandemic may impact manufacturers of SOFA covers.

##### **1. Disruptions in Business Operations**

The COVID-19 pandemic has severely impacted the business operations of many sectors of the U.S. economy. Businesses have curtailed operations in efforts to safeguard the health of their employees and customers; these actions include restrictions imposed by state and local governments. PHTA reported that SOFA manufacturers have also been impacted by disruptions caused by the pandemic, ranging from limited to substantial disruptions. While test labs remained open, some manufacturers reportedly experienced longer delays in completing testing since March. Furthermore, according to PHTA, product changes, such as molding, tooling, and labeling, are often necessary after the results of testing are reported. These tasks could be affected by restrictions, which vary by location.



## 2. Executive Order 13924

On May 19, 2020, President Trump issued Executive Order (EO) 13924, “Regulatory Relief to Support Economic Recovery.” 85 FR 31385. EO 13924 encourages Federal agencies to address the economic consequences of COVID-19 by: rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility. They should also give businesses, especially small businesses, the confidence they need to reopen by providing guidance on what the law requires; by recognizing the efforts of businesses to comply with often-complex regulations in complicated and swiftly changing circumstances; and by committing to fairness in administrative enforcement and adjudication.

## 3. Manufacturers of SOFA Covers and Market Information

The Commission has identified approximately 20 firms that currently manufacture products that would appear to be affected by the revised standard. Under size standards issued by the U.S. Small Business Administration, manufacturers of SOFAs with fewer than 750 employees (including their subsidiaries and affiliates) are considered to be small businesses.<sup>8</sup> On this basis, nearly all of the manufacturers and importers of suction outlet fitting assemblies are believed to be small businesses. As

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<sup>8</sup> U.S. Small Business Administration (2016). *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*. Retrieved from: [http://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table.pdf](http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf).

noted, some manufacturers reportedly have had greater disruptions due to COVID-19 restrictions than others. We do not know the portion of SOFA manufacturers that have been more severely impacted.

VGBA-compliant drain cover sales are comprised of covers sold with new pools and replacement covers for previously installed pools. Current sales of SOFAs are unknown; however, statistics reported by APSP provide a rough indication of the number of units sold annually. APSP reports that 58,000 in-ground pools, 184,029 hot tubs, and 2,432 commercial pools were sold or installed in 2014.<sup>9</sup> These new installations likely introduced at least 225,000 SOFAs requiring VGBA-compliant drain covers. The installed base of in-ground pools, hot tubs, and commercial pools totaled more than 11 million in 2014, according to statistics reported by APSP. Manufacturers of plastic drain covers typically recommend that they be replaced in 5 to 7 years (and this is stated on the covers). If such recommendations are followed, the market for replacement VGBA-compliant covers could exceed 1.5 million units annually.

#### 4. Six-Month Delay in Effective Date

As discussed in Section C and D of this preamble, the Commission believes that an extension of the effective date, up to 6 months, will not have a significant adverse effect on public safety. Therefore, the Commission is providing relief to SOFA manufacturers as a result of the COVID-19 crisis, by extending the effective date of the drain cover standard. The Commission has considered the two separate requests submitted by PHTA. The 60-day extension is the minimum request made by PHTA,

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<sup>9</sup> The Association of Pool and Spa Professionals (APSP)(2015). U.S. swimming pool and hot tub market 2014.

based on their most current estimates of potential impact on the pool and spa SOFA manufacturers. The 6-month extension is the maximum request made by PHTA, based on their early, although erroneous, understanding of test laboratory closures.

Due to the uncertainties surrounding the COVID-19 pandemic, and the likely minimal impact that an extension of the effective date might have on public safety, and the direction in EO 13294 to address the economic consequences of COVID-19, the Commission is delaying the effective date of the mandatory drain cover standard in 16 CFR part 1450 by 6 months, to May 24, 2021.

#### **F. Paperwork Reduction Act**

The drain cover standard does not impose any information collection requirements. Accordingly, this rule is not subject to the Paperwork Reduction Act, 44 U.S.C. 3501-3520.

#### **G. Environmental Considerations**

The Commission's regulations provide a categorical exclusion for the Commission's rules from any requirement to prepare an environmental assessment or an environmental impact statement where they "have little or no potential for affecting the human environment." 16 CFR 1021.5(c)(2). This rule falls within the categorical exclusion, so no environmental assessment or environmental impact statement is required.

#### **H. Preemption**

Section 26(a) of the CPSA, 15 U.S.C. 2075(a), provides that where a consumer product safety standard is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a requirement dealing

with the same risk of injury unless the state requirement is identical to the Federal standard. Section 26(c) of the CPSA also provides that states or political subdivisions of states may apply to the CPSC for an exemption from this preemption under certain circumstances. Section 1404(a) of the VGBA specifies that a rule issued under section 1404(b) of the VGBA shall be treated as a consumer product safety standard under the CPSA, thus, implying that the preemptive effect of section 26(a) of the CPSA would apply. Therefore, the rule will invoke the preemptive effect of section 26(a) of the CPSA when it becomes effective.

## **I. The Congressional Review Act**

The Congressional Review Act (CRA; 5 U.S.C. 801-808) states that, before a rule may take effect, the agency issuing the rule must submit the rule, and certain related information, to each House of Congress and the Comptroller General. 5 U.S.C. 801(a)(1). The submission must indicate whether the rule is a “major rule.” The CRA states that the Office of Information and Regulatory Affairs (OIRA) determines whether a rule qualifies as a “major rule.” Pursuant to the CRA, this rule does not qualify as a “major rule,” as defined in 5 U.S.C. 804(2). To comply with the CRA, the Office of the General Counsel will submit the required information to each House of Congress and the Comptroller General.

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Alberta E. Mills, Secretary,

U.S. Consumer Product Safety Commission.

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